No. 3411

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
*Appellant,*

vs.

DOMINION OIL COMPANY et al.,
*Appellees.*

## BRIEF FOR APPELLEES.

ANDREWS, TOLAND & ANDREWS,
J. R. PRINGLE,
A. L. WEIL,
*Solicitors for Appellees.*



PERNAU-WALSH PRINTING CO.

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In this case, the bill of complaint makes two distinct charges against the defendants:

(1) That the diligence required by the Pickett Act was not exercised;

(2) That the location was void because it was made on behalf of the defendant, British American Oil Company.

On petition for rehearing, it was contended for the first time that the locations were speculative, in that "the parties did not intend to do anything to develop the property", and this point is also urged on the appeal.

It is to be regretted that in the so-called statement of facts so many details are stated that it presents a very complicated picture of a very simple matter, and at the same time, so many other details are omitted that the picture is not only very complicated but very badly distorted.

At the inception of work on the quarter section in controversy, the ownership of the location was claimed as it still is by the British American Oil Company. All the operating defendants are lessees or sub-lessees of this corporation. There has never been any controversy over the title, except with the government, and all the work done was admittedly done under and for the use and benefit of the location which is here involved.

The first attempts towards the development of this property, not resting on the recollection of the parties, but based on the records of disinterested tradesmen, show (see page 569) that on September 17, 1909, there was delivered from the McKittrick yards of the King Lumber Company to this property some 367 pieces of rig lumber, varying in size from 16 by 18 to 1 by 12; that on September 21, 1909, there was delivered from the same place and the same company, 120 pieces of similar lumber for that purpose.

According to the bill of Hickox & Hubbard, teamsters and contractors, there were employed in hauling this lumber on September 17th, two four-horse teams and one six-horse team; on September

18th, 2 four-horse teams and one six-horse team; on September 19th, two four-horse teams and on September 21st one six-horse team (see page 579).

For a period ante-dating the delivery of the rig lumber, the exact date of which is not entirely certain, and continuously thenceforward, there were several men on the ground in the occupation of the land in the employ of the defendants. These are variously estimated as being from three to eight or ten. Obviously, until the lumber arrived, they could not be engaged in drilling the well, but, as the witness says, "These men were getting ready to operate, building the roads, sump holes for the derrick, or clearing the brush" (page 581).

On September 20, 1909, a complete outfit was ordered from the California National Supply Company, consisting of rig irons, tools, cordage, boiler, engine and fittings, at a total cost of about seventy-five hundred dollars. While this was being done, others interested were making an effort to get rig builders, who were very scarce and difficult to get in the field. This is shown by the fact that in the building of this rig, one contractor and his gang started the work, quit before it was finished to go to another job, that a second contractor and his gang carried it forward, and quit, and finally the first contractor, through personal friendship, was induced to leave a job he was on, and go back and finish it up. The whole work may be summarized in the statement of the witness Maxwell, who has no interest whatsoever in this land, and who said: "The

only way of fixing the date is that as soon as we entered into this preliminary agreement (for a lease, his best recollection being September 20th) I started to get all lines moving to the best of my ability".

It must be borne in mind that this well was at the extreme frontier of development. The field was moving towards the north and west toward McKittrick, and at the time of the bringing of this lumber on the field, it was the extreme northwesterly development, and so far from the normal base of supplies in the Midway field that, as will be noted by the bills, the lumber was brought from McKittrick. Rig builders were almost impossible to obtain as the field was seething with activity. The available supply of water was not sufficient to meet the requirements of the close-in development, and the various water companies had long waiting lists. Lumber was scarce, and it was weeks before one of the essential portions of the rig could be obtained. Yet, in spite of all these handicaps, commencing with the delivery of the lumber on September 17, 1909, the rig was erected, housing arranged for the men, boilers set, engines installed, roads fixed, the water was contracted for, and the lines were laid, the well was spudded in and oil struck by the 25th day of December, 1909.

It must not be thought that any of this energy was induced by the so-called withdrawal of September 27, 1909. This withdrawal, as a matter of common knowledge, came without warning, like

a bolt from the sky. Although dated September 27th and usually designated as the withdrawal of September 27th, it did not pass out of the general land office at Washington until October 5th, and was not received in the local land offices until October 11, 1909 (see page 218-219). Even then, it was weeks before anybody really heard of it.

Regardless, therefore, of any complication of statements, it is impossible to confuse or refute this outstanding fact, that on September 17, 1909, when the first lot of lumber was delivered, there was practically nothing on this quarter section, and that by December 25, 1909, the quarter section had been completely equipped and oil struck at a depth of 500 feet. **Res ipsa loquitur.**

In this view, the citation of authorities would seem to be unnecessary. There are many cases where the measure of diligence has been passed on by the various federal courts, and in one case by this court. We venture to say that in not one of them where the possession of the defendant was sustained under the Pickett Act has there been as great diligence as in the case at bar, whether that diligence be measured by the effort put forward by the defendants or whether it be measured by the results obtained by them.

We feel that there is no testimony that throws the slightest question on the correctness of Judge Bean's finding that

> "From the time the lumber was delivered on the property in September to the time the

well was spudded in the property was continuously occupied by the employees of the lessees, engaged in such work as was possible preparatory to actual development. In short every reasonable effort seems to have been made to proceed with the drilling and whatever delays occurred were due to the inability to secure material and workmen".

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THE QUESTION OF FRAUD.

The allegations in the bill in charging fraud, were that the locations were made on behalf of the British American Oil Company and the case was tried on that theory. The evidence showed, without controversy, and the court found, that practically none of the locators of this quarter had ever heard of this British American Oil Company for a considerable time after the locations were made. Furthermore (page 22 of appellant's brief), counsel admit that they have failed to make out a case on this point.

They now, for the first time, call attention to another allegation of the bill substantially to the effect that if the location was not made for the benefit of the British American Oil Company it was made

> "for some one else other than the persons whose names were used in said pretended location notice, and the names of the pretended locators above set out were used to enable the defendant British American Oil Company or some person other than said persons whose names were so used to acquire more than twenty

acres of land in violation of the laws of the United States''.

The requirements of equity pleading in the matter of charging persons with fraud certainly do not countenance any allegation of so vague a nature as this.

Patton v. Taylor, 7 How. 159;
Voorhees v. Bonestell, 16 Wall. 16;
Bartol v. Walton, 92 Fed. 14.

It is furthermore to be noted that the allegation is fatally defective in that it does not charge that the purpose of this location was to vest more than a twenty-acre interest in one person *in one location*. An individual is not restricted in the number of twenty-acre locations or twenty-acre interests which he may secure, provided only that one person cannot secure more than a twenty-acre interest in a single association claim. Still counsel doubtless intended that the gravamen of the charge to be that the purpose of the location was to secure for some one in excess of an eighth or a twenty-acre interest, in one location.

That the locations were not for the individual benefit of the persons whose names appeared on the locations, is of course immaterial, as one may locate through an agent, provided only that locations through an agent or in other persons names are not used as a mere cover for obtaining a greater interest in the location than the law permits.

Walton v. Wild Goose etc. Co., 123 Fed. 209, 217;

McCulloch v. Murphy, 125 Fed. 147;
Book v. Justice, 58 Fed. 106;
Hirbour v. Reeding, 3 Mont. 15;
Rush v. French, 1 Ariz. 99;
Moritz v. Lavelle, 77 Cal. 10.

If any legislative authority could add anything to these decisions it may be noted that there are special formalities required by the Act of August 1, 1912, for the execution of powers of attorney to locate mining claims in Alaska without any statutory provision in the law as elsewhere applicable.

But, according to the government's own statement of the facts in this case, and as is distinctly supported by all the evidence, which is not contradicted, no one obtained more than a twenty-acre interest in this location. An association was formed for the purpose of locating this and other claims toward the end of 1907. This association consisted of fifteen persons. Six of the fifteen acting as a sort of unofficial committee ran the affairs of the association, to wit, A. H. Butler, Senator Dorsey, M. Z. Elliott, F. R. Strong, Dr. McDonald and Senator Jones. Each one of these six had associated with him in turn one or more persons whose interests he took care of, who were generally referred to by the witnesses as belonging to the Butler group, or Jones group, etc. Thus, for example the Butler group consisted of

A. H. Butler,
Mrs. Butler,
A. H. Butler, Jr.

These persons had together a one-fifth interest in the association. Each of the other groups had one-fifth of what remained, or a 4/25 interest in the association. The groups were as follows:

| | |
|---|---|
| Dorsey Group | Senator Dorsey |
| | Mrs. Dorsey |
| | George Haldeman |
| Elliott Group | M. J. Elliott |
| | D. Davis |
| Strong Group | F. R. Strong |
| | Geo. W. Dickenson |
| | L. W. Andrews |
| McDonald Group | Dr. McDonald |
| | J. E. McDonald |
| Jones Group | Senator Jones |
| | Roy Jones |

The locations were made on behalf of the association by their agents. Some of the locators were members of the association and some were not, but that was merely a matter of detail and convenience. Those locators who were members of the association only had such interest in the lands covered by the location as was reflected by their interest in the association, and regardless of the fact that on the face of the location notice they were entitled to an undivided one-eighth interest.

We, therefore, have the situation of a location by agents for an association of sixteen persons, none of whom had more than an eighth interest in the location. After the location was made, for convenience in handling, the property was conveyed to

Elliott and F. R. Strong as trustees. The only survivor of these group heads, F. R. Strong, who was also a trustee, testified that he and his associates held the title in trust for the members of the association, and in accordance with the interest that had originally been agreed upon. He did not testify that they held the title to this property in trust for the British American Oil Company, as stated in appellant's brief.

At first, there was considerable uncertainty as to how the claims were to be developed and it was only after much consideration that it was, subsequently, thought advisable to incorporate rather than hold the title in trust, and some discussion arose amongst the members of the association as to the advantages of the laws of the different states for the purposes of incorporation.

Dr. McDonald then called attention to the fact that a considerable time before, he and some other people had organized a corporation under the laws of Arizona, known as the British American Oil Company; that the purpose for which this company was organized had been abandoned, and the company now stood intact without assets or liabilities, and could be conveniently used for this purpose. The status of the corporation was first investigated and Dr. McDonald's offer accepted. The property was conveyed by the trustees to the corporation, and the stock of the British American Oil Company was finally issued to the members of the association

in accordance with their interest as agreed on at the time the association was formed.

Learned counsel, in his brief, makes this single point, that there is a distinction without a difference between locating land for the benefit of an association, and locating it for the benefit of the same persons who are members of a corporation. He says

> "They (the locators) were acting merely for an unnamed and unincorporated organization which was to take and hold the locations as a unit, and be put into the proper form as soon as possible."

There are many who agree with learned counsel's views of the law, and think that the use of the word "association" in the placer mining laws would include a corporation, so that an association placer mining claim might be located for a corporation, if there were a sufficient number of persons interested. Unfortunately for counsel's position, and others, the land office has held that a corporation, regardless of the number of its stockholders, can locate only twenty acres, and this view was held by the court in the case of

Gird v. California Oil Co., 60 Fed. 531.

On the other hand, the statute distinctly provides that an association of persons may locate not exceeding 160 acres as an association placer mining claim, and this view, of course, receives unanimous recognition from the courts and the land office.

Section 2330, Rev. Stats.;

Rooney v. Barnette etc., 200 Fed. 700;

Cook v. Klonos, 164 Fed. 529;
Nome v. Snyder, 187 F. 385;
Hall v. McKinnon, 193 F. 572.

This effectually disposes of this point in the brief.

Were it necessary to add anything to the finding of the learned trial judge on the bona fides of this location, it might be of interest that the land office has had the same locators before it in two applications for patent, on the southwest quarter and the southeast quarter of the same section and on the same record as in the present case held that the locations were valid.

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### THE DOCTRINE OF SPECULATIVE ENTRIES.

For the first time, on rehearing, the government urged a point that was not only new to this case, but new to the mining law. It was not set up in the pleadings. No proof was offered to support it at the hearing, and no authority is cited to uphold it in the brief.

The charge that the location was "speculative", is in effect a charge of fraud, if the government's legal proposition can be sustained, and there is not one word in the bill raising an issue on this point.

As has been stated before, it is a well established rule of equity pleading, that no relief will be granted on the ground of fraud unless it be made a distinct

allegation in the bill, so that it may be put in issue by the pleadings.

Patton v. Taylor, 7 How. 159;

Voorhies v. Bonestall, 16 Wall. 16;

In

Bartol v. Walters, 92 Fed. 14,

the court said:

> "The bill is founded solely on the charge of fraud, and such a bill must always be specific. It is not enough to charge fraud in general terms. The facts constituting the fraud must be stated."

In the face of this obvious rule, it is quite certain that a charge of fraud cannot be supported by an allegation of quite a different sort of fraud, as happened in this case.

Not only must the fraud be alleged, but it must be proved and must be proved by clear unequivocal and convincing testimony. See

Webb v. United States, 204 Fed. 78;

United States v. Budd, 144 U. S. 154;

United States v. Barber Lumber Co., 194 Fed. 24;

United States v. Albright, 234 Fed. 202.

There was not one word of testimony offered in the case on this point. Practically every surviving member of the original association was in the court-room as a witness for either plaintiff or defendants, and not one of them was interrogated as to whether the association intended to do any work or not.

Had the issue been made or even proof offered, defendants could at least have made an effort to throw some light on the situation.

The government, after sedulously avoiding this issue, now seeks to draw the inference that the association did not intend to develop the land, from the single fact that a large number of locations were made at one time. However potent this inference might be as to claims that were not developed, how can this inference be made in regard to a claim on which a well was drilled and discovery actually made? The obvious and unescapable answer to the suggestion that they did not intend to develop is that they did develop, and every one is presumed to intend the natural consequences of his acts.

It is very obvious that the real point of appellant is that the work must be done by the locator himself. Otherwise, we would have a so-called paper location posted January 1, 1908, which appellant contends, and, of course, we concede, of itself was a futile act—that it had no validity whatsoever against the United States. No intent could give it any vitality. The mining law requires diligence, not mental attitude. If a proper intent could add nothing to this futile act, an absence of all intent could do no injury and at this stage of the operation, intent is, therefore, a false quantity.

It is only after the claim is developed and discovery made that the question of intent can possibly have any bearing and then we have the government

in the extraordinary situation of asking the court to infer that the locators did not intend to do that which they have done.

This may be made very clear by assuming that it is a crime to discover oil on the public domain, assume that this association made a location as herein shown, leased the land providing in the lease for development work and reserving a royalty on the product. With what effect could defendants, in a criminal prosecution defend on the ground that they did not intend to produce oil?

Therefore, we repeat that the gist of the argument is that, unless the locator do the work personally or out of his own resources, the location is a purely speculative one. That is, that he cannot perfect his location through a vendee, licensee, lessee or associate who may be otherwise given an interest for advancing money. This result necessarily follows for the reason that if a locator can sell, lease or license after location and before discovery, there can be no objection that he has such an intention in his mind. It surely can never be unlawful to intend to do that which the law permits to be done.

This position against selling or leasing, or intending to do so is, of course, contrary to the statutes and the cases. There has never been any restriction whatsoever on the disposition of mining claims, except in the solitary instance when the land office in the Yard case (38 L. D. 59), reversing its practice of many years and the decisions

of the state courts, held that the conveyance of an association claim prior to discovery to a single individual destroyed it as an association claim. Congress almost immediately repudiated this Yard decision and restored the law as it had always been theretofore recognized,

> "That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral, oil or gas, solely because of any transfer or assignment thereof, or of any interest or interests therein by the original locator or locators or any of them to any qualified persons or person or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof as in other cases; provided, however, that such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry."
>
> 36 Stats. at Large, p. 1015.

The statute was applied

> In re Graham, 40 L. D. 128.

It is furthermore well established by the decisions of this court that all acts of location including discovery may be performed by any agent or employee of the locator or by any person in his behalf and for his benefit.

> Walton v. Wild Goose etc. Co., 123 F. 209-217;
>
> McCulloch v. Murphy, 125 F. 147.

There is therefore no legal support for the proposition that a locator cannot perfect his rights by a discovery made by his lessee, and consequently for the proposition that there is any inhibition on an intent so to do.

But this is not all. If a locator cannot locate with the expectation of arranging with others to finance his work, it necessarily follows that to make a valid location of an oil claim, he must have sufficient money to drill on oil well.

Under this theory, the mining laws grant to a man with, say, $40,000, rights they deny to a man with only $5000, and by a "speculator" the appellant refers to a citizen who presumes to locate public lands which are really reserved for citizens with money.

That this contention has not been appropriately commented on in any adjudicated cases is due, we believe, to the fact that this is the first time an American counsel, driven by the desperation of his position otherwise, has had—shall we say—the courage to advocate it.

It seems to us that the confusion of thought in reference to speculative entries arises out of the phraseology of the statute involving the timber lands. In that statute, the applicant is required to make a verified statement that "He does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he has not directly or

indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title which he might acquire from the government of the United States shall inure in whole or in part to the benefit of any person except himself".

20 Stat. 89; Amend. 27 Stat. 348.

There is nothing analogous to this in the statutes relating to placer mining claims, and the very fact of its inclusion in the one statute and its exclusion from the other would seem to be conclusive that it is not applicable. In order to vest title to a mineral application, the law requires but three things; (1) citizenship; (2) marking the boundaries; (3) discovery. There is nothing said about intent or purpose. A locator may develop it into a mine and operate it, or he may sell it as a prospect.

In this case, there was the requisite citizenship, and there was the necessary discovery, and thereafter the title vested.

The cases cited by learned counsel for the government in their brief have certainly little bearing on the question. Cook v. Klonos and Rooney v. Barnette, involve the question of locations made in the name of one set of persons for the benefit of others, and the question simply was whether those others by any scheme thus evolved received more than a twenty-acre interest in any one location. Reading these cases together, the law becomes very clear that if the location is made by the

requisite number of persons, but there is an agreement before the location or perhaps at the very time of the location, whereby more than a twenty-acre interest inures to the benefit of one of the locators or some third person, then the location is void to that extent, whereas, if there is no agreement at the time of the location, or prior thereto that the locators may dispose of the land as they see fit, and it does not affect the validity of the location. It is true the government has sought to prevent the accumulation of large tracts of land by a few persons as was said in Cook v. Klonos, but a specific method has been adopted to prevent this. The method in placer mining claims is to deny rights to more than one hundred and sixty acres on a single discovery, and then only if there are at least eight locators, not one of whom has more than an eighth interest in the claim. Thereafter, all that the law requires is the expenditure of one hundred dollars a year, and it does not require even this, except insofar as the claimants may desire to exclude relocations by third parties. In the absence of such relocations or adverse contention by third parties the mere fact of discovery is sufficient, and no work at all need be done upon the land. There is nothing in the law which prevents any one making as many placer mining locations as he likes, and if he makes a discovery on each one, he can hold them all. If he does not make a discovery on some, but does on others, he loses the ones that he fails to work on, but holds the ones that he does work on.

To recognize the novel proposition contended for by the appellant would cloud the title to all mining claims in the west. And more than this, cloud it in a way that could never be finally settled except by a final judgment in each case. For this reason, if for no other, the law should be left as it is.

In conclusion, therefore, it is urged: That the learned judge of the district court was correct in finding from the testimony introduced that there was due diligence at the time of the withdrawal; that he was correct in his findings that the charge of fraud set out in the bill of complaint was not sustained, and this the counsel for appellant admits; and finally that the novel doctrine of speculative entry is not within the pleadings, is not supported by any evidence, and is not the law of the land.

Dated, San Francisco,
February 21, 1920.

Respectfully submitted,

ANDREWS, TOLAND & ANDREWS,
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